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INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY, JURORS AND ASSESSORS AND THE INDEPENDENCE OF LAWYERS

Report of the independence of the judiciary and the protection of practising lawyers, prepared by Mr. Louis Joinet pursuant to Sub-Commission resolution 1992/38

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INTRODUCTION

Universal Declaration of Human Rights

Article 10

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

1. All special rapporteurs, whether "thematic" or "country", have emphasized the close relationship that exists between the greater or lesser respect for article 10 of the Universal Declaration of Human Rights and the greater or lesser gravity of the violations established. In other words, human rights and fundamental freedoms are all the better safeguarded to the extent that the judiciary and the legal professions are protected from interference and pressure.

2. This is also needed to satisfy the requirements of the various United Nations instruments whereby these fundamental conditions of respect for individual freedoms and rights must be met erga omnes:

(a) The Universal Declaration of Human Rights of 10 December 1948 (arts. 10 and 11);

(b) The International Covenant on Civil and Political Rights of 16 December 1966 (arts. 2, 9, 10 and 14);

(c) The Basic Principles on the Independence of the Judiciary (hereinafter referred to as "Judiciary Principles") adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan, 26 August-6 September 1985); 1/

(d) The Guidelines on the Role of Prosecutors (hereinafter referred to as "Prosecutor Guidelines") adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August-7 September 1990); 2/

1/ See Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985 (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.2, and General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; see also A Compilation of International Instruments (United Nations publication, Sales No. E.88.XIV.I), chap. G.38.

2/ See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990 (A/CONF.144/28), resolution 26 (chap. I, sect. C.26) and instrument 3 (chap. I, sect. B.3), respectively. These principles were endorsed by the General Assembly at its forty-fifth session; see resolution 45/166 of 18 December 1990.

(e) The Basic Principles on the Role of Lawyers (hereinafter referred to as "Lawyer Principles"), also adopted by the Eighth Congress on the Prevention of Crime; 2/

(f) The principles contained in the draft declaration on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers (E/CN.4/Sub.2/1988/20/Add.1 and Add.1/Corr.1) prepared by Mr. L.M. Singhvi, the importance of which was noted by the Commission on Human Rights in its resolution 1989/32 of 6 March 1989.

1. Background

3. These, then, are the raisons d'être of the present report, which is inspired largely by Economic and Social Council decision 1980/124 of 2 May 1980 entrusting Mr. L.M. Singhvi with the preparation of a report on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers (E/CN.4/Sub.2/1988/20). Mr. Singhvi's reflections are at the origin of the draft declaration mentioned above, which was formulated as a result of a fruitful dialogue with States. At its fortieth session, the Sub-Commission adopted resolution 1988/25 of 1 September 1988, expressing its appreciation and thanks to the Special Rapporteur for his enduring and valuable contribution to the legal doctrine relating to the independence of justice, which is one of the primary prerequisites for the promotion and protection of human rights.

4. The draft declaration was transmitted to the Commission on Human Rights at its forty-fifth session. By resolution 1989/32, the Commission invited Governments to take into account the principles set forth in the draft declaration in implementing the "Judiciary Principles". The Commission also welcomed the Sub-Commission's decision to include in its agenda a separate item on the independence of judges and lawyers and requested it to consider effective means of monitoring the implementation of the "Judiciary Principles".

5. At its forty-first session, in 1989, the Sub-Commission adopted resolution 1989/22 of 31 August 1989, in which it invited the author of the present report to prepare a working paper on means of improving monitoring the implementation of the Basic Principles on the Independence of the Judiciary and the protection of practising lawyers and to ensure respect for, and full and effective application of, these principles.

6. In a working paper submitted to the Sub-Commission at its forty-second session (E/CN.4/Sub.2/1990/35), the Special Rapporteur suggested that the Sub-Commission should ask one of its members to prepare a report which would make a system-wide analysis of the advisory service and technical assistance programmes of the United Nations as regards the independence of the judiciary, as well as bringing to the attention of the Sub-Commission cases in which legislative or practical measures had served to strengthen or weaken the guarantees of independence and impartiality or the measures of protection concerning the exercise of the legal professions.

7. This suggestion was adopted by the Sub-Commission in its resolution 1990/23 of 30 August 1990, as subsequently confirmed by General Assembly resolution 45/166 of 18 December 1990 and Commission on Human Rights resolution 1991/39 of 5 March 1991. The report submitted pursuant to those various resolutions appeared in document E/CN.4/Sub.2/1991/30 and Add.1-4.

8. By its resolution 1991/35 of 29 August 1991, the Sub-Commission extended the Special Rapporteur's mandate and requested him to turn to a more comprehensive study of practices and measures which have served to strengthen or to weaken the independence of the judiciary and the protection of the legal profession.

9. At its forty-fourth session, the Sub-Commission, after considering the further report of the Special Rapporteur (E/CN.4/Sub.2/1992/25 and Add.1) decided, by resolution 1992/38 of 28 August 1992, to entrust the Special Rapporteur with the preparation of a report:

(a) To bring to the attention of the Sub-Commission information on practices and measures which have served to strengthen or to weaken the independence of the judiciary and the protection of practising lawyers in accordance with United Nations standards;

(b) To propose specific recommendations regarding the independence of the judiciary and the protection of practising lawyers, to be taken into account in the advisory services and technical assistance programmes and projects of the United Nations, and, in that regard, to follow up the recommendations contained in his first report (E/CN.4/Sub.2/1991/30 and Add.1-4);

(c) To examine ways and means of enhancing cooperation and avoiding overlapping and duplication in the work of the Commission on Crime Prevention and Criminal Justice and that of the Sub-Commission on Prevention of Discrimination and Protection of Minorities;

(d) To elaborate on the recommendations contained in his report (E/CN.4/Sub.2/1992/25/Add.1).

10. In 1993, at its forty-ninth session, the Commission on Human Rights adopted resolution 1993/44 of 5 March 1993, endorsing this decision of the Sub-Commission.

2. Interpretation and performance of the mandate

11. For the purpose of preparing the present report, the four-point mandate given to the Special Rapporteur, as mentioned above, was executed in the following manner:

(a) Collection of information on practices which have served to strengthen or to weaken the independence of the judiciary and the protection of the legal professions: on his own initiative, or through responses to notes verbales and letters from the Secretary-General of the United Nations, the Special Rapporteur gathered information on the situation of the judiciary

and the legal professions from government representatives, international organizations and non-governmental organizations. This information is reported and commented on in the two chapters forming Part One of the present report.

(b) The situation regarding advisory services and technical assistance was analysed, in particular, on the basis of the Secretary-General's report for 1993 (E/CN.4/1993/61), taking into consideration the changes that have occurred in the implementation of those programmes. Some specific recommendations are mentioned in the account of advisory service activities given in Part One, chapter I, section A.

(c) In order to enhance cooperation, and hence coordination, between the Commission on Crime Prevention and Criminal Justice and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, or in other words between Vienna and Geneva, it is proposed to institutionalize the de facto distribution of responsibilities which has gradually been established between the two bodies. This question is addressed in Part Two of the report.

Part One

POSITIVE OR NEGATIVE MEASURES AND PRACTICES CONCERNING GUARANTEES OF INDEPENDENCE, IMPARTIALITY AND PROTECTION

Chapter I

POSITIVE MEASURES AND PRACTICES, INCLUDING IMPLEMENTATION OF THE PROGRAMME OF ADVISORY SERVICES AND TECHNICAL ASSISTANCE

A. Implementation of the programme of advisory services and technical assistance

1. General presentation

12. The Secretary-General's excellent report on advisory services in the field of human rights, submitted at the forty-ninth session of the Commission on Human Rights (E/CN.4/1993/61 and Corr.1 and Add.1), is helpful in this connection. The report reflects a reorientation of the use of advisory services and technical assistance which takes account of recent developments in the relationship between respect for human rights and the democratization processes. As a result, the establishment of institutions and the development of a culture committed to the protection or promotion of human rights constitute a crucial element and one of the main priorities of the programme of advisory services and technical assistance.

13. The first stage of this new policy consists in conducting a mission to the requesting State to evaluate its needs, and the second in setting up a programme containing specific projects to meet identified needs. This change of policy has, inter alia, led to a modification of the philosophy underlying training and education activities. The Centre for Human Rights thus intends its training activities to have a specific and particular audience, in order that human rights principles, rather than being presented in the abstract from the standpoint of the international instruments, may be integrated into the professional concerns and responsibilities of the target audience; professional practices and national situations will therefore be measured against human rights principles.

14. With this in mind, the Centre is preparing teaching manuals to develop training projects for police officers and judicial officers, and other manuals aimed at ensuring the independence and impartiality of the judiciary.

15. As the report of the Secretary-General states, the United Nations programme of advisory services in the field of human rights was established pursuant to General Assembly resolution 926 (X) of 14 December 1955, authorizing the Secretary-General to make provision at the request of Governments and with the cooperation of the specialized agencies, where appropriate, for the following forms of assistance with respect to the field of human rights: (i) advisory services of experts; (ii) fellowships and scholarships; and (iii) seminars. Regional and national training courses were added in 1967 and 1986.

16. All these forms of assistance aim at:

(a) Furthering knowledge and understanding of international human rights standards with a view to promoting their widest application;

(b) Facilitating the implementation of special procedures and of the international human rights instruments; and

(c) Providing technical assistance to Governments in the establishment and development of national infrastructures for the promotion and protection of internationally recognized human rights standards.

17. The Voluntary Fund for Advisory Services and Technical Assistance in the field of Human Rights was established by the Secretary-General on 16 November 1987 pursuant to Commission on Human Rights resolution 1987/38 and Economic and Sccial Council decision 1987/147; its objective is to provide additional financial support for practical activities focused on the implementation of international conventions and other international instruments on human rights promulgated by the United Nations, the specialized agencies or regional organizations.

18. Practical activities to be financed by the Voluntary Fund include:

(a) Support for international cooperation aiming at building up and strengthening national and regional institutions and infrastructures with a view to improving, in the long term, the implementation of international standards;

(b) Expert and technical assistance to Governments with a view to creating and developing the necessary infrastructures to meet international human rights standards;

(c) Projects and programmes that can play a catalytic role in the practical realization of internationally recognized human rights standards;

(d) Projects for legal protection and the strengthening of the independence of the judiciary (Commission on Human Rights resolution 1992/80).

19. This last type of activity fully reflects the constant concerns of the Special Rapporteur in the framework of this report. As the Secretary-General pointed out in his report on advisory services to the forty-eighth session of the Commission on Human Rights in 1992 (E/CN.4/1992/49), an important element in the overall strategy of improving the observance of human rights is the strengthening of the administration of justice. Indeed, to be able to enjoy their human rights, individuals need the protection of a legal system that functions under conditions such that it is able to ensure enforcement of their rights. Such a system, therefore, can only be impartial, independent and rendered operational by judges, lawyers and jurors confident of their safety and of the absence of any interference in the exercise of their judicial functions.

20. In resolution 46/120 of 17 December 1991, the General Assembly endorsed that conviction, reaffirming the importance of the full and effective implementation of United Nations norms and standards on human rights in the administration of justice and noting that, "an independent and impartial judiciary and an independent legal profession are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice".

21. The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, contain the following text (A/CONF.157/23, part 1, para. 27):

> "The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development. In this context, institutions concerned with the administration of justice should be properly funded, and an increased level of both technical and financial assistance should be provided by the international community. It is incumbent upon the United Nations to make use of special programmes of advisory services on a priority basis for the achievement of a strong and independent administration of justice.".

22. In describing the achievements of the programme of advisory services and technical assistance that are of particular concern to this report, we will discuss below the distinction recommended by the Commission on Human Rights between activities financed under the regular budget and those financed under the Voluntary Fund.

2. Activities financed under the regular budget

(a) Fellowship programme

23. It should be noted that the fellowship programme is intended for candidates nominated by their respective Governments. When the Secretary-General invites States to submit nominations, he reminds them that nominees should be directly involved in functions affecting human rights, particularly in the administration of justice. The fundamental objective of the fellowship programme, which is considered to be a form of practical assistance to States, is to enable them, by using the skills of those who have completed the programme, to prepare the necessary mechanisms for complying with international human rights standards at the internal level. The building of an independent and impartial judicial system is one of these mechanisms.

24. For 1992, 32 fellowships were awarded, distributed as follows: Africa (12), Asia (6), Americas (7), Eastern Europe (3) and Western Europe (4). Ten additional fellowships were financed under the Voluntary Fund for Technical Cooperation in the field of Human Rights, and another 13 fellowships were awarded within the framework of technical assistance projects.

25. It should be mentioned that, at the conclusion of their training courses, fellowship-award recipients must submit a final report to the Centre for Human Rights on subjects directly related to their field of activities, most of them closely linked with the administration of justice and the implementation of international standards in their countries of origin.

(b) Advisory services of experts

26. States of emergency, and emergency situations in general, may seriously affect the independence and impartiality of the judiciary, and even destroy them altogether. In this connection, the advisory mission to Moscow by Mr. Leandro Despouy, Special Rapporteur on human rights and states of emergency, organized by the Centre for Human Rights from 1 to 4 September 1994, constitutes an initiative to be encouraged. The topics discussed included the establishment and enforcement of states of emergency during conflicts in the Republics of the former Soviet Union, in particular in the Caucasus. All the participants underlined the necessity of national legislation on states of emergency, in conformity with international conventions on human rights. At the conclusion of the mission, the Special Rapporteur considered that the Centre's cooperation with the Republics could take place within the context of the advisory services. A technical assistance programme has been formulated by the Centre and is currently under discussion.

3. Activities financed under the Voluntary Fund

27. The Fund's resources are mainly allocated to activities aimed at establishing or strengthening national or regional institutions that can play a catalytic role, in the medium term, in developing and strengthening regional institutions or national infrastructures intended to promote and safeguard human rights. On this basis, the question of the independence and impartiality of the judiciary is dealt with as a part of the activities initiated through the Voluntary Fund. The following are examples of activities undertaken in 1992:

(a) Needs assessment missions

(i) São Tomé and Principe

28. At the request of the Government of São Tomé and Principe, and in accordance with the desire expressed in a previous report, the Centre began by conducting a needs assessment mission from 23 to 30 September 1992. In his report, the expert addressed various areas of the administration of justice closely related to human rights. With regard to the courts, he recommended the collection of documentation and the establishment of a basic library on human rights; the supply of equipment; the establishment of regulations concerning the professions of lawyer and solicitor; and the organization of training courses on human rights for judicial officials. As regards penal institutions, the expert recommended the publication of legislation on the prison system in conformity with the internationally established rules for the treatment of prisoners, and the supply of equipment and training for senior personnel in the treatment of prisoners and human rights.

(ii) Mongolia

29. At the request of the Government of Mongolia, the Centre, in cooperation with the non-governmental organization the International Human Rights Law Group, formulated a programme aimed at providing the country with an independent judicial system. After a thorough inspection and intensive consultations with all the parties concerned, the expert proposed measures, both legislative and practical, to strengthen the independence of the judiciary. The preliminary report was transmitted to the Mongolian Minister for Foreign Affairs so that its relevant elements might be taken into consideration in the parliamentary session on judicial reform. The final report will be the basis for a programme of assistance, in accordance with the Government's reactions to the expert's recommendations.

(b) Training courses

(i) Regional training course for English-speaking African countries (San Remo, Italy, 9-13 March 1992)

30. In cooperation with the International Institute of Humanitarian Law, the Centre organized a training course on the implementation of international human rights instruments and the administration of justice for officials from English-speaking African countries. The course had two specific goals: to assist the African countries in strengthening their infrastructure for the promotion and protection of human rights, of which the administration of justice is an integral part; and to familiarize participants with scrutiny of national human rights standards and practices in the light of the requirements of international standards.

(ii) Albania (Tirana, 2-6 November 1992)

31. The Centre organized at Tirana an intensive training course on human rights in the administration of criminal justice for 60 police, prison and military officials. Topics covered in the course included: the sources, systems, and standards for international human rights in the administration of criminal justice; the duties and guiding principles of ethical police conduct; the use of force in law enforcement; the crime of torture; effective methods of legal and ethical interviewing; human rights during arrest and interviewing; the legal status and rights of the accused; standards for search and seizure; pre-trial detention and the role of police; the administration of justice in situations of internal conflict, states of emergency and civil disorder; minimum standards for facilities for prisoners and detainees.

(iii) Romania (Bucharest, 19-23 October and 30 November-4 December 1992)

32. The October course on human rights in the administration of criminal justice was attended by some 70 police, prison and military officials from various regions of the country. The topics covered included those listed above for the course in Tirana (see para. 31).

33. In addition, from 30 November to 4 December 1992, the Centre held a seminar on human rights in the administration of justice for 40 Romanian judges, lawyers and procurators in Bucharest. Participants from around the country took part in discussions and working sessions led by a panel of international and domestic experts on a range of subjects related to the human rights implications of the daily work of legal professionals. Topics covered included international sources, systems and standards for human rights; the independence of judges and lawyers; human rights in criminal investigations; the rights of the accused during arrest and detention; the elements of a fair trial; standards for the protection of prisoners; non-custodial measures; the administration of juvenile justice; equality and non-discrimination in the justice system, and the rights of women in the administration of justice.

(c) Information programme

Cambodia

34. In Cambodia, the Centre is implementing an information programme under which it has financed the publication of educational materials and the production of audiovisual material. It has also arranged for some of the fundamental instruments to be translated into Khmer and widely distributed to the Cambodian population. Thus, by the beginning of 1993, a number of United Nations human rights instruments, some directly related to the impartiality and independence of the judiciary, had been translated into Khmer: the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Code of Conduct for Law Enforcement Officials; the Standard Minimum Rules for the Treatment of Prisoners; the Basic Principles on the Independence of the Judiciary; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

35. At the invitation of the Special Representative of the Secretary-General for Cambodia, a mission from the Centre for Human Rights also identified a number of areas of activity to be explored, including human rights education, training for members of the judiciary, law enforcement officials and non-governmental organizations and assistance in the drafting of legislation and of the Constitution.

(d) Technical assistance programme

Uruguay (Montevideo, 3-4 December 1992)

36. At the request of the Government of Uruguay, a technical cooperation agreement for the promotion of human rights was signed in 1990. A human rights section in the Ministry of Foreign Affairs, established in 1991, is responsible for the coordination of activities in this field and is in charge of the implementation of the programme. The main objectives of the programme are to disseminate information on international human rights instruments and their implementation and to provide practical assistance in establishing national infrastructures for the promotion and protection of human rights. During 1992, training courses have been conducted for law enforcement officers, including police officers, magistrates and prison officers.

37. In the context of evaluation of the programme, the Centre's project officer visited Montevideo on 3 and 4 December 1992. He made certain recommendations to the national experts recruited under the programme: to concentrate their efforts on the adaptation of national legislation to international standards, to reform the Code of Criminal Procedure and to review the training programmes for military and police staff. A priority of the courses should be, inter alia, the prevention of torture and other cruel, inhuman or degrading treatment or punishment. He also recommended that the Government of Uruguay should apply officially for an extension of the programme for one year.

(e) Future activities

38. A number of requests for advisory services and technical assistance are under consideration. The implementation of these activities will depend on the human and financial resources available to the programme, both under the regular budget and under the Voluntary Fund.

The following projects relate to the independence and impartiality of the judiciary:

(a)	Madagascar	Fellowships and training courses for judges, teachers of law and law enforcement officers; organization of a training course at Antananarivo;
(b)	Mongolia	Continuation of assistance; follow-up to the assessment of the needs of the judiciary;
(c)	Albania	Continuation of the assistance programme through the provision of experts to assist the national authorities in conducting the legislative process, the training of law enforcement officers and the translation of documents;
(d)	Brazil	Workshops on human rights in the administration of justice;
(e)	Ecuador	Strengthening of national institutions to train police officers in human rights principles and to train administrators of justice.

B. International standards

Protection under ILO Conventions

39. The widely-ratified standards laid down by the International Labour Organization provide basic protection in the area of professional legal activities; their impact is greater than is generally supposed. For example, one of the essential guarantees of the impartiality and independence of the judiciary is contained in Convention No. 111, the Discrimination (Employment

and Occupation) Convention, adopted by the International Labour Conference at its forty-second session on 25 June 1958, which came into force on 15 June 1960: this Convention prohibits any discrimination in employment made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin. These provisions were on several occasions found to apply to judges and other professionals involved in the functioning of judicial institutions, which provides minimal assurance of the impartial administration of justice.

40. Another aspect of protection of the legal professions is illustrated by standards in the field of trade-union freedoms. Under the provisions of Convention No. 87 concerning Freedom of Association, adopted by the International Labour Conference at its thirty-first session on 9 July 1948, which entered into force on 4 July 1950, all workers, including judges, lawyers and other members of the legal profession, have the right to establish and to join organizations of their own choosing for the protection of their rights, and to organize themselves in order to protect their interests. These provisions may prove essential in helping these professional groups collectively to resist potential encroachments on their independence.

41. It should also be noted that ILO runs a programme of technical cooperation and advisory services intended to help States to implement international labour standards. These programmes may obviously be helpful in guaranteeing the independence and impartiality of the judiciary as provided for in the texts of the Conventions.

C. Positive regional measures and practices

1. General situation in Central and Eastern Europe

42. In response to suggestions from certain organizations, in particular the Helsinki Institute for Crime Prevention and Control, the Special Rapporteur would like to point out some features of the situation as it is developing in this part of the world. Central and Eastern Europe are currently undergoing considerable political, institutional, economic and social upheavals, which are radically affecting the development of the States of the region; some of these effects have already been mentioned in the previous report (E/CN.4/Sub.2/1992/25, paras. 47-56 and 62).

43. Broadly speaking, the main positive consequence of current developments may be said to be a drastic change in the conception of the law. Previously conceived in a monolithic manner - as a means of defence for the State, the same role also being assigned to the various judicial authorities, the law is seen today as a means of reconciling divergent interests; at the same time, efforts are focusing on setting up a system that will strike a proper balance between the various authorities within the administration of justice.

44. One of the consequences of this conceptual revolution for the judiciary has been the emergence of a system which is less and less inquisitorial and more and more adversarial, and which requires judges to play a new role. They must now ensure equal terms among the parties to criminal proceedings,

especially between the public prosecutor and defence counsel. Another consequence is the much more active role that lawyers will be called upon to play. Both these factors should increase the independence of the judiciary.

45. It is in the hope of seeing these developments continue that the Special Rapporteur is now taking up the situation in Central and Eastern Europe; many obstacles remain, however, and should be described at this point.

(a) Mention should be made, first of all, of the dual deficit, both statutory and social, that is affecting the legal profession: statutory deficit in that judges and assessors, like all civil servants in the States of the region, have seen their real income plummet; the social deficit relates to the fact that their participation in the institutions of the previous regime, participation often characterized by objective if not subjective connivance, has given them an image of partiality and untrustworthiness such that they have lost all esteem in society in general.

(b) Another concern is the increase in crime throughout the region; members of the legal profession and the police lack the technical and material resources considered essential in order to combat crime.

This situation is causing some disillusionment among judges, assessors and lawyers, prompting many of them to turn to more lucrative activities; this further worsens the situation of the judicial system and jeopardizes its progress towards greater impartiality and independence.

2. Organization of American States

46. In the framework of regional cooperation, which is always desirable, the Inter-American Commission on Human Rights has undertaken a study "on the measures necessary to enhance the autonomy, independence and personal integrity of the members of the judicial branch so that they may investigate violations of human rights properly and perform their functions to the fullest". The degree of seriousness of violations of human rights is commensurate with the moral influence acquired by the judiciary.

47. The following is a summary of the conclusions of the Inter-American Commission that fall within the scope of this report:

(a) Many countries are experiencing chronic situations that generally militate against the security of the judiciary, but there are also other countries with specific critical situations connected to political violence or violence connected with drug-trafficking, which have aggravated these situations of insecurity, hindering the proper functioning of the system of justice;

(b) The harassment, hounding and violence to which members of the judiciary and lawyers in general are subjected are not isolated incidents, but part and parcel of widespread violence. These situations of violence have ominous consequences that transcend the exercise of human rights, extending to many other aspects of social life;

(c) Such acts are perpetrated on the assumption that they will go unpunished, an assumption validated in practice;

(d) The members of the legal professions who are the actual or potential victims of situations of violence are often caught in the crossfire between guerrillas and State or paramilitary agents, to which must be added the power of drug-traffickers and their hirelings.

48. Thus the report emphasizes, with regard to the Americas, the extent of the problem to be dealt with and the manifold potential threats to the impartiality and independence of the judiciary. It also stresses the overriding need to ensure security and physical protection for all members of the profession. The opinion of the Inter-American Commission on Human Rights has been studied in this part of the report, which covers positive measures and practices, because it shows an awareness of the problem with which we are dealing and militates in favour of the introduction and observance of the various principles formulated by the United Nations.

3. Draft additional protocol to the European Convention on Human Rights

49. The Association of European Magistrates for Democracy and Freedoms (MEDEL) is a network of national judges' associations in both Eastern and Western Europe. Considering the number and importance of the reforms under way, both in the East to adapt institutions to the new political situation following the fall of the people's democracies, and in the West to assuage the feeling of discontent that is spreading among the judiciary in most of these countries, on 15 January 1993 at its Palermo Congress MEDEL prepared a draft additional protocol to the European Convention on Human Rights, which, if used as a reference, would make it possible, if not to standardize the legislative and institutional reforms under way, at least to promote consistency.

The draft develops the minimum standards set forth in the "Judiciary Principles", the "Lawyer Principles" and the "Prosecutor Guidelines" (see para. 2 (c)-(e) above). The text of this interesting initiative is reproduced in an annex to this report.

D. Positive national measures and practices

1. South Africa

50. As stated in the previous report (E/CN.4/Sub.2/1992/25, paras. 9-15) and confirmed by the information received this year, South Africa is currently a vast building site from the political and institutional standpoints, although it is no stranger to outbursts of violence, largely attributable to the use of agents provocateurs whose activities are aimed at discrediting the peace process (see report of the Secretary-General of 22 December 1992, S/25004, para. 30). Since negotiations are still under way between the various parties, it is not possible to present final conclusions. Certain elements, however, already appear to be established.

51. The judicial system is seriously deficient in seeking out those responsible for crimes of violence. At worst, these deficiencies take the form of complicity by the security forces with the instigators of these

crimes, a fact which perpetuates the cycle of violence. At best, they are indicative of a shortage of qualified and competent staff. The reform of the police services has been initiated. It is aimed at changing the concept of a "police force" to one of a "police service". It requires changes in structures, the help of foreign experts, training efforts, the mobilization of resources and the political will to reach the highest levels of the State. It should be noted that the United Nations Educational and Training Programme for Southern Africa is cooperating in the training of local lawyers and judges. At the same time, the United Nations Trust Fund for South Africa supports work in the legal and judicial areas aimed at ensuring that legislation is introduced to repeal the principal laws on apartheid, to remedy the negative effects of those instruments and to increase confidence in the rule of law.

2. Germany

52. The Special Rapporteur has received, for information, a Council of Europe document (CJ-JU (92) 37 of 17 September 1992) which contains the replies of the German Government to a questionnaire entitled: "Efficiency and fairness of civil justice". Guarantees of independence are provided in the following areas: recruitment (temporary provisions are being planned on required qualifications in order to harmonize the system in the former GDR); working conditions (salary, working hours, age of retirement, career development); and competent bodies for appointments, promotions and disciplinary measures.

3. Armenia

53. The Ministry of Foreign Affairs refers to the adoption, on 13 February 1990, of the Constitution of the Armenian SSR (Amendments and Additions) Act, modifying, in particular, the procedures for the election of judges; judges are now elected by parliament and their term of office has been increased to 10 years.

54. Considering these measures to be only partially satisfactory, the Armenian authorities emphasize the contribution to the process of creating an independent judiciary made by the Declaration of Independence of Armenia (23 August 1990), which lays down the principles of the separation of powers and the depoliticization of law enforcement agencies (e.g. judges forbidden to belong to a political party).

55. The Law introducing additions and amendments into the Codes of the Republic of Armenia regarding Criminal Procedure, Legal Proceedings and Administrative Offences, adopted on 1 July 1991, also defines the criminal and administrative measures to be taken in respect of activities impeding the administration of justice (e.g. interference in judicial procedures, threatening or insulting a judge).

56. While showing the importance of these contributions, the Ministry of Foreign Affairs of Armenia stresses the need for a radical judicial reform. Bills aimed at promoting the adoption of (a) structural and functional changes in the law enforcement agencies, and (b) new principles regarding court procedures and organization, although not yet adopted by parliament, will be taken into consideration after the adoption of the new Constitution. The

independence of lawyers is the subject of new legislation currently in preparation. It is aimed at eliminating the State monopoly in the area of legal assistance.

4. Belgium

57. The Act of 18 July 1991 amended the rules of the Judicial Code concerning the training and recruitment of judges. The preamble to the Act speaks of the desire to end political appointments of judges by the executive power, by introducing objective criteria for the selection of candidates on the basis of their maturity and intellectual capacity, in order to refurbish the public image of the judiciary and to give greater standing to the judicial function.

58. There is now a two-track system for recruiting judges:

(a) The first track takes the form of a competitive examination for admission to a judicial traineeship. The tests are organized by a judges' recruitment board, composed exclusively of judges, lawyers and university teachers, appointed for a renewable period of four years by the Senate by a two-thirds majority of votes cast. The candidates admitted take a three-year training course, supervised by judges, State prosecutors and lawyers, who meet in committee to give their opinion on every judicial appointment and can suggest that the Ministry of Justice exclude a candidate if his work is not satisfactory after he has completed at least 12 months of the training course;

(b) The second track takes the form of recruitment of candidates with professional experience in another field who wish to bring the fruits of their experience to the judiciary. These candidates take a professional aptitude test, organized by the recruitment board, following which they obtain a certificate of proficiency. It should be noted that there has been some criticism to the effect that the second track may be used in order to avoid the more lengthy procedure of the judicial training course.

5. Bolivia

59. The Government of Bolivia has recently completed a significant reform by enacting a new law on the organization of the judiciary in the Republic, aimed in particular at increasing the independence and impartiality of the judiciary. The main statutory amendment concerns the method of designating Supreme Court judges, who will now be appointed by the Senate on the basis of a qualified two-thirds majority, on the proposal of the Chamber of Deputies. This new law was followed by a Public Prosecutor's Department Act. This reform also contains a number of practical measures designed to eliminate the main criticism: the slowness of proceedings.

60. It should be noted that the Supreme Court has already displayed determined independence by recently punishing the perpetrators of extremely serious violations (overthrowing the constitutional Government) and 44 of their collaborators; they were sentenced to 30 years' imprisonment. Among those sentenced were: Luis Garcia Meza, former dictator and former Minister of the Interior; Luis Arce Gomez, the person primarily responsible for

organizing repression; Guido Benavidez, former head of the National Investigation Department; Freddy Quiroga, former head of the Special Security Service, and his deputy, Tito Montano.

6. Brazil

61. Tragic events took place on 2 October 1992 at São Paulo prison, where police action to control an outbreak of violence among prisoners resulted in the death of 111 of the latter. The Brazilian Government stated that it was deeply concerned about those events, promised to disclose the conclusions of the various commissions of inquiry and recognized the right of the victims and their families to fair compensation, in view of the fact that the victims had been in State custody. It should also be determined whether judges have visited the scene of the events and what their role has been.

62. The Special Rapporteur hesitated for a long time before including the steps taken following this tragedy in the positive part of the report. He took account of the fact that the Brazilian Government now seems to be prompted by a desire to allow independent and impartial action by the judiciary in this case. The following positive measures have been taken:

(a) Prisoners or the families of deceased prisoners unable to pay for legal advice may request the State Prosecutor to initiate lawsuits on their behalf;

(b) They may also receive legal assistance from a commission established by the Brazilian Bar Association within the prison itself or from a number of lawyers and students of São Paulo University Law School;

(c) Similarly, the National Council for the Criminal and Penitentiary Police, an organ linked to the Ministry of Justice, is to ensure that the detainees will be able to testify freely in the legal proceedings resulting from this case.

63. The first two compensation procedures initiated by inmates' families have been sent to the judiciary by the State Prosecutor. If no practical action is taken further to these measures, the case should be included in the negative part of the next report.

7. Brunei Darussalam

64. Since 1 January 1993, Brunei has been appointing its own judges from among its nationals, whereas previously the Court of Appeal and the High Court had been manned by judges from outside the country, generally Hong Kong. The Supreme Court. Act and the Subordinate Court Act, governing the appointment procedure, which is basically the responsibility of His Majesty the Sultan of Brunei, are considered by the authorities as strengthening the independence of the judiciary.

65. As regards the criminal justice system, the Attorney-General has a role as public prosecutor. All serious cases are referred to him for advice on the charges to be instituted, and prosecutions are instituted under his name and conducted by him or those authorized by him. If the criminal offence carries

a penalty of a fine or up to seven years' imprisonment, the Magistrates' Courts are competent to try the case. The High Court and the Intermediate Courts try offences punishable by more than seven years' imprisonment. Capital offences are tried by two judges of the High Court. Legal aid applies mostly to cases involving capital punishment (murder, drug-trafficking).

8. China

66. The authorities state that the independence of the judiciary constitutes a principle of China's socialist legal system and is not subject to any interference or pressure, particularly as regards the appointment of judges and procurators. To enhance the independence of the courts, China has announced a reform of court procedure and the pattern of trials. To that end, it states that the Supreme People's Court has submitted to the Standing Committee of the National People's Congress an initial plan for amending the People's Courts Organization Act. The central feature of this plan is the desire to arrive at a virtually perfect trial procedure.

67. In response to the information contained in the previous report (E/CN.4/Sub.2/1992/25, paras. 146-151), it is stated that defence rights and lawyers' functions are freely and fully exercised and are in no way affected by the supervision of lawyers' associations by the Ministry of Justice. The Chinese authorities also object to the statement that a procedural rule requires lawyers never to plead not guilty (para. 149); in consequence, they also consider to be untrue reports that sanctions such as non-renewal of licence and refusal of housing applications (para. 150) were imposed on that basis on the lawyers of Wang Juntao and Chen Ziming.

68. Contrary to the findings of a mission of lawyers cited in the previous report (para. 138), the training of judges, especially legal training, is by no means inadequate. The Chinese authorities also contest the communication from the Hong Kong Bar Association contained in the 1992 report (para. 140), according to which the safeguards for the independence of the judiciary and the legal profession contained in the Joint Sino-British Declaration on the status of Hong Kong as from 1 July 1997 are considerably weakened by certain provisions, in particular article 158 of the Basic Law ratifying the Declaration, adopted at the third session of the seventh National People's Congress and promulgated on 4 April 1990.

9. Cuba

69. The Cuban Government described the new basic provisions guaranteeing the independence of the judiciary resulting from the reform of the Constitution adopted in June 1992 by the National Assembly of the People's Power. In accordance with article 122, "The judges shall be independent in the exercise of their function and owe obedience only to the law".

70. The Cuban Government poses a question of principle, which might be discussed by the Sub-Commission, namely: "Do the courts draw their legitimacy from an autonomous judiciary, or does this legitimacy derive from the constituent power?" The Cuban system is based on the second option, to the extent that "the power to administer justice springs from the people and is exercised, on their behalf, by the People's Supreme Court and the other

tribunals established by law" (art. 120). "The courts constitute a system of State organs, set up in such a way as to ensure its functional independence and subordinate to the National Assembly of the People's Power and the Council of State" (art. 121). Since judges render justice in the name of the people, therefore, there must be a relationship between them and an institution representing the people, in this case the National Assembly of the People's Power, which is represented by the Council of State between sessions.

71. As a result of the foregoing, the administration division (Sala de Gobierno) of the People's Supreme Court - which plays the role of public prosecutor - can only give guidelines of a general nature, and not case by case: it simply guides criminal policy. In order to appreciate more clearly the scope of this constitutional principle, it would be helpful to know the conditions in which judges are appointed, the procedures for their advancement and the criteria for assigning cases. A request for additional information on these points should be sent to the Cuban authorities, who have offered to provide it.

10. Finland

72. According to the Finnish authorities, the independence and impartiality of the judiciary have traditionally been considered as having priority, in particular under the Constitution, in accordance with which judicial power is exercised by independent courts; efforts accordingly focus on making this independence effective both in law and in practice.

73. Most provisions relating to the appointment of judges are considered to have constitutional rank. Under these provisions, judges are irremovable and may not be deprived of office except by a fair trial. Similarly, they cannot, without their consent, be transferred to another post, except in the case of a reorganization of the judiciary.

74. The Code of Judicial Procedure contains special provisions regarding restrictions on a judge's actions and on the possibilities for a judge to act as counsel in the course of a trial. The provisions of the Civil Servants Act restrict the right of judges to engage in secondary occupations. The Constitution expressly prohibits the establishment of courts of special jurisdiction and no person may be tried by a court other than that which has jurisdiction over him by law.

75. The independence of the judiciary has been further strengthened by the establishment of provincial administrative courts having the status of tribunals, which were formerly subordinate to the administrative authority, and by the enactment of legislation setting an age-limit for presidents and justices of the Supreme Court. Lastly, the European Convention on Human Rights, which contains provisions relating to independent and impartial courts of law, became binding upon Finland on 10 May 1990.

11. France

76. In the previous report (E/CN.4/Sub.2/1992/25, paras. 20-22 and 120-122), we referred to the criticisms of the status of French judges made by the judges' professional organizations. The main criticism related to two aspects of the executive's control over the courts:

(a) The predominant role of the Head of State in the appointment of judges. This situation derives from the constitutional principle (art. 64) according to which, "The President of the Republic shall be the guarantor of the independence of the judicial authority". Judges are in fact appointed by the President, after an advisory "opinion" by the Supreme Council of Justice (except as regards the judges of the Court of Cassation and the Chief Justices of the Courts of Appeal, in respect of whom the Supreme Council of Justice makes "proposals"). In fact, the Council is chaired by the President of the Republic, who designates its members!

(b) The control of the Ministry of Justice over the procurators, who form part of the hierarchical body headed by the Minister of Justice, who is thus in principle responsible for all prosecutions.

77. On the first point, the proposed constitutional reform referred to in the previous report is currently under discussion by the Parliament. Its thrust is towards a reduction of the executive's control over the courts, in particular by incorporating elected judges into the Supreme Council of Justice and giving it near-equality of decision-making with regard to judges; with regard to procurators, it would play an advisory role. This reform would complete an initial series of functional measures which have already limited political influence over appointments. These are:

(a) The so-called "transparency" procedure, under which all courts post notices of vacancies and lists of candidates, which include the candidate proposed by the Ministry of Justice; any candidate who is excluded can challenge the Minister's choice in writing, his letter being referred to the Supreme Council of Justice, which gives it very careful attention;

(b) The establishment, pending the conclusion of the constitutional reform, of a consultative board of the government procurator's department, which issues an opinion that is made public on all proposed judicial appointments.

78. On the second point, regarding prosecution, the Minister of Justice has undertaken not to investigate each and every case but to limit his role to general guidelines, for example concerning criminal policy. This is a first step towards a certain autonomy for the government procurator's department, although it is not intended to enact specific legislation on the question owing to divergent views among the various parliamentary groups. Some are in favour of hierarchical dependency or independence equal to that of judges, while others are in favour of the above-mentioned principle of autonomy.

12. Iraq

79. According to the information transmitted by the Iraqi authorities, article 63 (a) of the Iraqi Constitution provides for the total independence of the judiciary in relation to the other authorities of the State. The fact that, in order to be appointed by presidential decree, magistrates must be graduates of the Faculty of Law and of the Institute of the Magistrature, where they take a two-year course of theoretical and practical studies, is

thus regarded as a guarantee. Furthermore, they must have practised the profession of lawyer, or some other judicial profession, for at least three years.

80. Judges are responsible for their acts only to the Committee on the Affairs of the Magistrature, which is the sole organ empowered to dismiss a judicial officer. Enjoying total immunity, they may, however, be prosecuted with the authorization of the Minister of Justice. The training of auxiliary judicial personnel is given particular attention. Thus, a notary or examining magistrate may be appointed only if he is a Faculty of Law graduate and has completed a course at the Institute of the Magistrature. A similar training effort is required of other auxiliary personnel: bailiffs, judicial assistants, etc.

81. The profession of lawyer is regulated by Act No. 173 of 1965, as amended, which guarantee lawyers full freedom of action in the exercise of their profession. The profession is self-regulating, through the Bar Council, whose members are elected by direct suffrage from among all lawyers. Lawyers, as graduates of the Law Faculty and required to respect the ethics of their profession, are solely responsible for the substance of their pleading and are not subject to any governmental authority. A lawyer's office and person enjoy a special status under the law and the rules of search, like the headquarters of the Bar Council.

13. Kuwait

82. The Lawyers Committee for Human Rights has drawn the attention of the Special Rapporteur to a bill intended to terminate the executive's control over the composition of the High Judicial Council and over the appointment of judges. The purpose of the bill is to convert the High Judicial Council into an independent judicial body, the majority of whose members would be appointed by members of the judiciary itself. The bill has been submitted by the Ministry of Justice and may be adopted by July 1993.

14. Lebanon

83. The third Centre for Human Rights Conference at Jinane University was held, in conjunction with the Beirut and Tripoli Bar Councils, on the subject of "The independence of the judiciary in Lebanon". Some of the recommendations adopted reflect the growing awareness of the subject of the independence and impartiality of the judiciary, and of the need for better guarantees for them in the light of the difficult situation of justice in Lebanon. The Conference concluded its work by addressing a number of recommendations to the executive and legislative authorities in Lebanon. The recommendations included the following:

(a) That the prerogatives enabling it to ensure its independence should be conferred on the judiciary;

(b) That the judiciary should be accorded the means of rejecting external influences and resisting intervention by the executive and the legislature, particularly with regard to career development, promotion, the determination of grades, the nature of functions, transfers, dismissal and salaries;

(c) That a Higher Council of the Magistrature should be established on the sole basis of competence and by means of election by judges, to be responsible for the overall management of the corps of judicial officers (appointments, promotions, careers, transfers, disciplinary measures, etc.). Given that these recommendations reflect an awareness of the overriding need to ensure the independence and impartiality of the judiciary, the Rapporteur, after lengthy deliberation, has finally decided to include the situation in Lebanon in the present chapter relating to positive practices and measures.

15. Morocco

84. The Moroccan Minister of Justice refers to the recent reform of the Constitution enacted on 9 October 1992; article 80 provides for the independence of the judiciary in relation to the legislature and executive. The reform and its implementing legislation are intended to bring the legal system into conformity with the relevant standards of the International Covenant on Civil and Political Rights, which Morocco has ratified. In the absence of any constitutional provision about the legal hierarch of norms, there has been a growing tendency for judicial decisions to give primacy to treaties over domestic law.

85. Judges are appointed by the King, on the proposal of the Higher Council of the Magistrature, over which he presides and which is now composed of the following:

(a) Members as of right: the Minister of Justice, Vice-President; the First President and the Crown Procurator-General to the Supreme Court; and the President of the First Division of the Supreme Court;

(b) Members elected by their colleagues (four representatives of the courts of first instance and two of the courts of appeal).

86. It should be noted that there are still two courts of special jurisdiction: the Permanent Court of the Royal Armed Forces and the Special Court of Justice. A reform currently under preparation relates to the establishment of specialized jurisdictions for administrative litigation (provision is made for seven administrative tribunals).

16. Mexico

87. Although the situation of lawyers and human rights activists is sometimes precarious, it should be emphasized that the Government has taken positive measures. Thus Mrs. Maria Térésa Jardi, lawyer and human rights activist, has received death threats; as a human rights campaigner, Mrs. Jardi is director of the Solidarity and Human Rights Department in the Archdiocese of Mexico City and legal adviser to the Solidarity and Human Rights Commission based in Chihuahua. The threats she has received have been clearly linked

with her work in the area of human rights, such as her investigation into the murder of Manuel Oropeza, a journalist and political activist, and her denunciations of the methods and practices of the Federal Judicial Police. In the face of these repeated death threats, the Office of the Attorney-General of the Republic has ordered an inquiry and assigned bodyguards to protect Mrs. Jardi. The fact that President Salinas himself has met Mrs. Jardi is a source of satisfaction. In recent years, human rights activists, such as Norma Corona, have already been threatened or murdered. In view of these positive developments and provided that they are followed up, it has finally been decided to include this situation in the positive part of the report.

88. It should be recalled that Principle 16 of the Basic Principles on the Role of Lawyers establishes a guarantee that lawyers shall be able to perform all their professional functions without hindrance, intimidation or harassment, while Principle 17 provides that, where the security of lawyers is threatened as a result of discharging their functions, they must be adequately safeguarded by the authorities. In addition, Principle 23 guarantees lawyers' freedom of expression, belief, association and assembly.

17. Mongolia

89. The Government of Mongolia has referred to the particular attention given, through the process of democratization under way since 1990, to the independence of the judiciary and to the protection of judges and lawyers. The new Constitution adopted in 1992, in its chapter entitled "The Judiciary", provides that judges shall be independent and subject only to the law. Consequently, neither private individuals nor, a fortiori, the President, the Prime Minister, the representatives of the State, public officials or political parties may interfere in the way in which judges perform their duties.

90. On the basis of these constitutional principles, a Court Organization Act was adopted in February 1993 in order to guarantee the independence of judges in the practical discharge of their functions; it covers salaries, appointments, immunities, their period of office and disciplinary measures. A General Court Council was established with responsibility for ensuring the independence of the judiciary with regard to the appointment of judges, protection of their rights, etc. A bill is currently being prepared on the reform of the status of lawyers and is intended to strengthen their guarantees.

18. Namibia

91. According to the information received from the Government, the independence and impartiality of the judiciary in Namibia are firmly ingrained in the national life of Namibia. Their protection is ensured by article 78 (3) of the Constitution, under which no one is permitted to interfere with judges or judicial officers in the exercise of their functions.

92. The judicial system consists of courts at various levels, and the independence and impartiality of the judiciary have been strengthened by new legislation (Supreme Court Act, High Court Act). With regard to the lower courts (Magistrates' Courts and Community Courts), legislation should be

passed shortly to bring them into line with the democratic character of the country and the Government's respect for human rights and to strengthen their independence.

93. The Government has, for its part, taken a number of opportunities to remind people of the importance of the independence of the judiciary (press releases, seminars, budget speeches, etc.).

94. Respect for the independence of the legal profession (attorneys and advocates) is also stressed and, the Government states, protects lawyers from any form of harassment, persecution or interference in carrying out their duties. The independence of these professions is also strengthened by the statutory provisions of two Acts and by professional bodies composed of attorneys and advocates.

95. The jury system does not exist in Namibia. However, a judicial officer may call on the services of an assessor, whose appointment and activity are the exclusive responsibility of that officer.

19. Philippines

96. The Philippines, where the political context is difficult, is dealt with in paragraph 111 in chapter II of the first part of the present report. The Government has enacted several laws whose enforcement will, it is hoped, be instrumental in strengthening the impartiality and objectivity of the judicial system. The Witness Protection, Security and Benefit Act (RA 6981) and its implementing legislation organize the protection of witnesses by establishing certain guarantees for them (protection, supervision, change of identity, penalties for harassment) in order to encourage them to contribute to the course of justice. The Rights of Arrested Persons Act (RA 7438) compels any public servant participating in an inquiry into, or arrest or detention of, a suspect to inform him of his right to assistance by a counsel of his choice. This Act establishes penalties for failure to give this information (fine, 8-10 years' imprisonment) and for any interference in the discharge of the lawyer's responsibilities, for which the penalty is a fine and/or 4-6 years' imprisonment. The effectiveness of this Act can only be tested in practice, since it essentially comprises provisions that already existed in the Constitution and earlier laws but seemed to be honoured more in the breach than the observance.

20. Poland

97. Despite the repeal of the 1952 Constitution, the constitutional provisions on the independence of the judiciary remain in force under the 1985 Courts Act and the 1989 National Council of the Judiciary Act. These provisions are, however, limited in scope owing to very numerous exceptions to their implementation. In the medium term, this situation should be remedied by the new constitution currently in course of preparation.

98. In the meantime, the 1985 Courts Act establishes minimum guarantees of independence for judges, among others, in the following areas: appointment procedures, immunities, disciplinary measures, incompatibilities (not allowed to be a member of a political party or to engage in political activity). With

regard to the principle of irremovability, it is stated, without further details, that there are exceptions to the rule whereby a judge may not be transferred without his consent. The 1982 Act also contains a number of guarantees of independence for lawyers. This matter will apparently be taken up in a reform of the Code of Criminal Procedure.

99. The Polish authorities consider that further efforts must be made with regard to access to the profession and the excessive limitation of contacts between the accused and the lawyer at the commencement of criminal proceedings. Attention is also drawn to the dangers represented by pressure from public opinion, the political parties and even the highest State authorities, in particular with regard to State prosecutors. The political climate is also mentioned as a factor threatening the independence of the judiciary, and hence hopes are expressed for progress towards political stabilization.

21. Samoa

100. According to the Government, constitutional and legislative provisions guarantee the independence of justice through application of the principle of the strict separation of powers. The impartiality of assessors is ensured by the Criminal Procedure Act of 1972 and the independence of lawyers by the Law Practitioners Act of 1976 establishing the Law Society, which is responsible for protection of the profession and, in particular, disciplinary measures.

22. Singapore

101. The Government states that the independence of the judiciary is guaranteed by the Constitution by virtue of the principle of the separation of powers. The Constitution also establishes guarantees of independence in the areas of the practical exercise of functions, remuneration and appointments; professional immunity is regulated by specific legislation. The Legal Profession Act, establishing the Law Society of Singapore responsible for regulating the profession (in particular, the maintenance and improvement of standards of professional conduct) and disciplinary procedures, ensures effective realization of this principle of independence. The Government further draws attention to the relevance of certain legislative and, in particular, statutory measures enhancing public confidence in the integrity of independent and impartial justice, relating to the disciplinary powers of the courts in the event of misconduct and the disbarment of members of the courts.

23. Slovenia

102. After the adoption, on 25 June 1991, of the fundamental constitutional instrument relating to the sovereignty and independence of the Republic of Slovenia, the first Constitution of the new independent State of Slovenia was promulgated on 28 December 1991. This Constitution guarantees the independence of the judiciary by virtue of the principle of the strict separation of powers and through the definition of the status of judges (in particular, appointment procedures, incompatibilities, immunities). The Constitution also guarantees the right of every person to a fair and impartial trial within a reasonable time and to a judgement handed down by a legally designated court and presiding judge. Courts of emergency jurisdiction are

forbidden in time of peace. The bills currently being prepared should be submitted for adoption shortly and should help to ensure the autonomy and impartiality of judges in the following areas: conditions of access to judicial professions, methods of selection and promotion, remuneration, disciplinary measures, irremovability. New legislation on the organization of the judiciary, on training in the duties of a judge and on the status of lawyers and prosecutors is envisaged.

24. Chad

103. According to the information received from the Ministry of Foreign Affairs, the Republic of Chad has established in its Constitution the principle of the independence of the judiciary; the irremovability of judges is considered as the necessary corollary of their independence (Constitution, arts. 40 and 42). This independence is reinforced by article 3 of Ordinance 008/PR/MJ/91 of 3 August 1991 establishing the statutes of the Magistrature. This article states: "Except in the cases provided for by law, and subject to the exercise of regular disciplinary powers, judges and justices of the peace may not be harassed in any way because of acts in which they engage in the exercise of their functions. Judges may not be called to account for the decisions which they render or in which they participate. Assessors and jurors shall enjoy the same protection as officiating judges."

25. Turkey

104. On 18 November 1992, the Turkish parliament adopted Act No. 3,842 amending the Code of Criminal Procedure and the Act establishing the State security courts and procedures before these court. Act No. 3,842 entered into force on 1 December 1992. It is presented as one of the components of an overall reform promised by the Turkish Government in the area of human rights. This reform falls within the context of a number of measures such as the raising of the age of majority from 15 to 18 years, the legal context of the period of detention, the right to apply to the judge for examination of the legality of detention, the right not to reply during questioning by the police and hearings by the judge, reform of the system of evidence and confessions, covered by articles 13 and 24 of the Act. An important guarantee is now established by Act No. 3,842, which provides that any suspect or detainee may, at any time during the investigation, have access to the services of a lawyer, whom he may ask to be present during police questioning. Any person under arrest must be informed of this right, failing which any confession is rendered invalid. It is provided that the Bar shall have sufficient funds to remunerate lawyers appointed ex officio, which will eliminate situations in which it was incumbent on the court itself to appoint and remunerate defence counsel. Future practice will determine the effectiveness of these positive measures.

Chapter II

NEGATIVE MEASURES AND PRACTICES CONCERNING GUARANTEES OF INDEPENDENCE, IMPARTIALITY AND PROTECTION

A. De facto violations

1. Violence, physical threats and harassment

(a) Cameroon

105. The situation of lawyers and judges has deteriorated in Cameroon pari passu with the deterioration in the political situation, undoubtedly as a result of a serious dispute following the presidential election. Thus particular attention should be drawn to the situations of Nyo Wakai, former President of the Supreme Court, Luke and Ophelia Senze, Francis Sama and Nfor Ngalla Nfor, who are jurists and lawyers. They were all arrested on 26 October 1992, very probably by a paramilitary group known as the Joint Flying Squads. They were not charged after their arrest and were refused access to a lawyer and to members of their families. Reports received in January 1993 stated that Francis Sama and Ophelia Senze had been released, although the reasons for their arrest are not known. The other jurists imprisoned at the same time as them were still being held in January. One cannot rule out the possibility that the arrests of these judges and lawyers were related to their support for the democratic opposition, which constitutes a violation of the right to freedom of expression, belief, association and assembly.

106. Lastly, regret must be expressed at the consequences, from the standpoint of the present report, of the declaration of a state of emergency on 27 October 1992 in North-East Province. It gives the local authorities powers to declare "security zones" in certain areas where the security forces are subsequently able to search any dwelling and detain persons for 15 days, without obligation to inform them of any charge or to institute proceedings against them.

(b) El Salvador

107. A number of assaults have been perpetrated against members of the legal profession; they have included the violent attacks against attorney José Eduardo Pineda Valenzuela. On two occasions, on 31 July and 17 August 1992, he and his wife were attacked at their home by two armed men, who wounded them and stole their cars. It should be emphasized that these events occurred shortly after Mr. Valenzuela had joined the staff of the new Human Rights Ombudsman's Office, which was established through the peace process negotiated under the auspices of the United Nations. The Government of El Salvador has strongly condemned the attack and has announced that it is undertaking a thorough investigation. Since the publication of the report of the Commission on the Truth, the situation has improved significantly.

(c) Malawi

108. According to reports by non-governmental sources, Orton Chirwa died in prison on 20 October 1992. He was a lawyer and proponent of democracy and human rights. He had gone into exile in Tanzania, from which he, with his wife, had been abducted in December 1981. He had been imprisoned since that date and tried for treason and sentenced to death in 1983. As a result of an international campaign, that penalty was commuted to life imprisonment in 1984. Vera Chirwa, his wife, who is also a lawyer and is still in prison, having been sentenced to the same penalty on the same charge, was pardoned by President H. Kamazu Banda on 24 January 1993. She was released from Zomba Central Prison and has reportedly rejoined her family.

(d) Uganda

109. According to information transmitted to the Special Rapporteur, Henry Kayondo, human rights activist and former President of the Ugandan Law Society, has been charged with "illegal possession of an official document", in violation of Uganda's Official Secrets Act. The document was allegedly found during an illegal search of Mr. Kayondo's office and taken from the confidential file of one of his clients, Mr. Zachary Olum, Organizing Secretary of the Democratic Party, an opposition party. This charge and the subsequent search appear to be harassment measures connected with the acquittal which Mr. Kayondo won for his client on 29 May 1992, the court having endorsed his argument that the proceedings against Mr. Olum had a solely political motive. It is to be regretted that the charge was prompted by a desire to intimidate lawyers and to deter them from becoming involved in politically sensitive cases. The search, undertaken without a warrant - in breach of Ugandan law, violated the confidentiality that has to govern a lawyer's relations with his client, which is in fact guaranteed by section 124 of the Evidence Act.

110. Mr. Kayondo's present situation is at variance with two of the Basic Principles on the Role of Lawyers:

(a) Principle 16 (a), which requires Governments to ensure that lawyers are able to perform all their professional functions without intimidation, hindrance, harassment or improper interference;

(b) Principle 22, which calls on Governments to recognize that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

(e) Philippines

111. According to information received during the preparation of this report, serious threats continue to be made against human rights activists and lawyers. Thus, the attorney José Manuel Diokno and his family have been subjected to repeated telephone threats. Even more disturbing is a new form of persecution of lawyers whereby, after having been accused of subversion, they are assimilated, in violation of Principle 18 of the "Lawyer Principles",

to the cause which they are defending. This is apparently the case with attorneys Ayo and Ceneta de Daet, who are regarded as subversive agents solely because they have undertaken to defend persons charged with subversion.

(f) Sri Lanka

112. Reports transmitted during the course of preparation of this report indicate that some lawyers and activists have been subjected to physical threats and pressure, and even beaten up, as a result of exercising their functions. Thus, there were 16 involuntary disappearances of lawyers between May 1988 and May 1991. Over the same period, 36 lawyers left the country following direct threats.

(g) Turkey

113. One of the most serious de facto violations of the independence of the judiciary is the practice of abduction of judges and jurists. It is in this context that the abduction of attorney Metin Can and Mr. Hasan Kaya in Turkey must be placed. On 21 February 1993, Mr. Metin Can, President of the Human Rights Association in Elayig, disappeared, together with Mr. Hasan Kaya, while on their way to the police station after receiving a telephone call stating that one of Mr. Metin's clients had been involved in a road accident and that their presence was necessary. During the next few days, members of the family were informed, by anonymous telephone calls, of the death of Mr. Metin and Mr. Kaya. It will be recalled that, in accordance with Principle 16 (a) of the "Lawyer Principles", Governments are obliged to ensure that lawyers are able to perform all their professional functions without intimidation, hindrance, harassment or improper interference.

2. Actions undermining the courts' need for objective and impartial information

(a) United States of America

114. Information received by the Special Rapporteur shows that the independence and impartiality of the judiciary may be jeopardized when the actions of judges or jurors are affected by the activity of the media, by a conflict of interests, or by improper use of the concept of "national security". The Special Rapporteur notes, in a positive sense, that in this country the media play an important role, in particular in preventing violations and shortcomings from being suppressed, ignored or even "hushed up"!

115. Certain recent cases nevertheless show that this role entails a serious risk. Too rapid or too one-sided intervention by the media may affect the impartiality of the court and guarantees of a fair trial or jeopardize the presumption of innocence. Reference may be made, by way of example, to the case of the former United States Senator Harrison Williams; NBC cameramen arrived at his home at the same time as the police officers sent to arrest him. Or the case of the so-called Joy Davis-Aylor murder, which gave rise to a television serial setting little store by the presumption of innocence even though, because of an ongoing extradition procedure, the case had not yet been tried.

116. The impartiality of the court presupposes that there is no interference by the governmental authorities in the course of the trial and that concepts such as "official secret" or "national security" are used in accordance with the principle of proportionality, in other words, in a manner compatible with the rights of the defence, and without violating the guarantees afforded to the accused. Cases such as that of the former CIA bureau chief, Fernandez, or the Larouche case, reflect possibly excessive usage of the prerogatives conferred on governmental authorities.

117. The first of the "Judiciary Principles" obliges all governmental and other institutions to respect the independence of the judiciary while the fourth principle stipulates that there shall not be any inappropriate or unwarranted interference with the judicial process. A balance between the rights of the defence, the right to information and, to a lesser extent and in quite exceptional circumstances, reasons of State must be achieved by taking the strictest possible account of the United Nations standards.

(b) Philippines

118. Reports received, in particular from United Nations bodies, give the impression that the independence of the judiciary may also be jeopardized. It would seem that, on the pretext of liaison and coordination, certain organizations in fact help to predetermine the opinion of judges on the cases of which they are subsequently seized - aside from any adversarial proceedings. This would appear to be the case with tripartite meetings of judges, members of the public prosecutor's department and military intelligence officers through the machinery of the Special Criminal Court Judges' Association, and with meetings held by the Joint Department of National Defense and the Department of Justice Action Committee for the Investigation and Prosecution of Insurgency Cases.

119. The "pre-trial" influence exerted on judicial authorities also results from the practice of certain military authorities whereby they present a defendant to the press after he has been kept incommunicado, without the assistance of a counsel, and before any trial. Such procedures undoubtedly jeopardize, inter alia, the principle of the presumption of innocence.

B. Violations in the operation of the law

1. Declaration of states of emergency or establishment of courts of special jurisdiction

(a) Algeria

120. The Algerian authorities have kindly sent the Special Rapporteur a copy of Legislative Decree No. 92/03 of 30 September 1992 relating action to combat subversion and terrorism. The Special Rapporteur cannot but welcome this spirit of cooperation, displayed in circumstances where recourse to political violence is making it difficult to ensure respect for human rights. The Decree, intended to deal with the current internal situation in Algeria establishes a new court, known as the "Special Court", competent to try offences considered to be under the heading of terrorism or subversion, which is defined as any offence against the security of the State, the integrity of

the territory or the normal functioning of the institutions. The following are examples of such offences: spreading terror among the population by attacking property or persons; impeding freedom of movement; founding, organizing or joining an association, group or body which perpetrates such acts; defending or encouraging such actions. The penalties which these offences normally carry have been increased by the implementing decree.

121. There are three Special Courts covering the whole of the country. Each Court is composed of five judges - one president and four assessors. The functions of the Public Prosecutor's Department are exercised by a Procurator-General, designated from among the public prosecutors, and the Court also comprises an examination division, headed by a judge. Article 17 of the Decree provides that Special Court judges shall be appointed by a non-publishable presidential decree, on the proposal of the Minister of Justice, and that any person who enables these judges to be identified shall be liable to two to five years' imprisonment. For a case to be referred to the Special Court, it must be removed ex officio from the ordinary court that was previously hearing it. The preliminary inquiry is conducted under the aegis of the Procurator-General to the territorially competent Special Court; it allows a custody period of up to 12 days. The examining magistrate or the police officers delegated by him are authorized to make all necessary searches or seizures, during the day or night, at any place within the national territory. The Special Court hearings are usually public, but the Court may decide, ex officio or at the request of the Public Prosecutor's Department, that all or part of its deliberations shall take place in camera. In any event, only decisions on the merits are rendered in public hearings. Decisions by the Special Court, except when handed down by default, are open only to an application for judicial review.

122. The provisions of the above-mentioned Decree call for a few remarks relating to human rights, and more particularly the Basic Principles on the Independence of the Judiciary:

(a) The conditions for the appointment of judges to the Special Courts appear to depart somewhat from the principles of independence and impartiality applicable to the courts as set out in article 10 of the Universal Declaration of Human Rights, and in the first and second "Judiciary Principles". The appointment of judges to the Special Courts, as provided for in the Decree, is the exclusive prerogative of the executive, which thus has sole responsibility for deciding which judges it intends to appoint to these posts and on which criteria.

(b) Some hold that the automatic transfer of cases from the ordinary courts to the Special Court, in accordance with article 39 of the Decree, is incompatible with a general principle of law which excludes retroactivity in criminal law matters, except in very specific cases. Regrettable as this situation is, the argument does not appear tenable. The principle of non-retroactivity, which is a general principle of law, entails two restrictions:

(i) On the one hand, it concerns only substantive criminal laws having an aggravating effect, that is to say, those whose effect is to increase the penalty, either through the amount in question or its conditions of execution;

(ii) On the other hand, it does not apply to formal, i.e. procedural, or jurisdictional criminal laws which are immediately applicable to the situation in question.

123. In this connection, a useful point was made in the conclusions and recommendations of Mrs. Nicole Questiaux's study on the implications for human rights of situations known as states of siege or emergency (E/CN.4/Sub.2/1982/15). Mrs. Questiaux criticizes the negative effects of the latter rule and proposes that international human rights law, which has been evolving on this point, should prompt countries to extend the principle of non-retroactivity to their procedural criminal legislation. This is all the more important as experience, especially that acquired by the thematic and country rapporteurs, has shown that the extent to which individual rights are violated is linked much more to the diminution of procedural guarantees than to the seriousness of the sentence, which is often reduced, or even annulled through amnesty, with the passage of time.

124. Regarding the actual principle of the establishment of courts of special jurisdiction, attention must be drawn to the fifth "Judiciary Principle", which states: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals".

125. Nevertheless, the provision of the above-mentioned Decree which stipulates that judges shall remain anonymous raises a problem. More and more countries faced with the problem of combating terrorism are resorting to this procedure which, although legally questionable, is not easily avoided in view of the correlative increase in the number of judges assassinated or abducted (besides Algeria, in Peru, Colombia, etc.). We believe that the next report should go more deeply into this question after it has been discussed at the forty-fifth session of the Sub-Commission.

(b) Israel

126. According to the Lawyers Committee for Human Rights, the information communicated to the Special Rapporteur concerning violations of the independence of the judiciary, set out in the previous report (E/CN.4/Sub.2/1992/25, paras. 98-100), remains valid.

(c) Peru

127. In its communication, the Lawyers Committee for Human Rights draws attention to the dangers of the anti-terrorism laws, especially as regards the redefinition of the crime of terrorism and of its aggravated form, treason against the nation (traición de la patria). While the acts which constitute the two grades of offence are similar in nature, treason cases are tried

before a military tribunal consisting of military personnel. According to some sources, there is an increasing tendency to use the new charge in order to take advantage of the more rapid military emergency proceedings. Another piece of legislation entailing serious risks for freedoms is Decree-Law No. 25,475 (May 1992), which authorizes the police to make arrests without judicial approval, simply requiring them to notify the judicial authorities within 24 hours. In addition, incommunicado pre-trial detention may last up to 15 days. The anti-terrorism courts use anonymous judges, prosecutors and witnesses for security reasons, which creates a definite imbalance, to the detriment of the rights of the defence. Mass dismissals of judges for political reasons are also reported, as well as political appointments of judges; these acts are incompatible with the "Judiciary Principles", in particular Principles 17 and 18.

(d) United Kingdom of Great Britain and Northern Ireland

128. The previous report (E/CN.4/Sub.2/1992/25, paras. 110-114) contained consistent accounts of pressure being brought to bear on lawyers of persons arrested in connection with action to combat terrorism. It is apparent both from the discussion at the forty-fourth session of the Sub-Commission and from the information given to the Special Rapporteur by the United Kingdom authorities, that:

(a) The British Government and the Royal Ulster Constabulary (RUC) both say that they would not tolerate any intimidation of lawyers;

(b) For the allegations to be investigated, they should be reported to the special branch of the RUC which investigates the failure of other members of the RUC to fulfil their duties and obligations.

129. As part of anti-terrorism legislation, the exercise of defence rights is restricted by section 45 of the Northern Ireland (Emergency Provisions) Act of 1991. An officer of at least the rank of superintendent may authorize a delay in access to legal advice and services if there are reasonable grounds for believing that allowing such access will lead to harm to evidence or the alerting of another suspect, hinder the recovery of property obtained as a result of the offence, interfere with another investigation or make it more difficult to prevent other acts of terrorism. The person refused access to a lawyer must be told the reason for the delay, and the reason must be recorded in writing. If contact with a lawyer is not delayed, in order to avert any of the negative consequences described above, the meeting takes place in the presence of a RUC police officer, who must be able to see and hear everything that takes place during the interview. This measure is in contradiction with Principle 22 concerning the confidentiality that should prevail in relations between lawyers and their clients.

130. Provisions similar to those mentioned above are contained in section 14 of the Prevention of Terrorism (Temporary Provisions) Act of 1989 and apply to England, Scotland and Wales.

2. Encroachments on professional or jurisdictional status

(a) Australia

131. According to information communicated to the Special Rapporteur, the executive authorities of the State of Victoria recently abolished a judicial body known as the Accident Compensation Tribunal. Some of its members, who had had the status of judge conferred on them, were dismissed from their posts and have not been re-employed in judicial functions. This measure is seen by the legal professions as undermining the independence of the judiciary.

132. In the State of Queensland, there have been reports of a certain diminution of the status of the judiciary, especially regarding its independence and the human and material resources available for the functioning of the service. The Supreme Court of Queensland Act of 1991 created changes in the organization and functioning of the Supreme Court, which have apparently led to a weakening of the role and powers of the Chief Justice. In addition, those changes were implemented following public exchanges between the Government and the Court regarding the question of Court resources. The organizations representing the legal professions are very concerned about the situation.

(b) Japan

133. The Japanese Federation of Bar Associations repeats its information concerning the encroachments on the independence and impartiality of the judiciary described in the previous report (E/CN.4/Sub.2/1992/25, paras. 85-87 and 123-128).

(c) Sri Lanka

134. The independence and impartiality of the judiciary are at risk whenever, domestically, the separation of the various authorities and powers within the State apparatus is insufficiently guaranteed. Various provisions in force in Sri Lanka appear to be interpreted by the Special Rapporteur's correspondents as measures that weaken the independence and impartiality of judicial officers. One example cited is article 4 (c) of the Constitution of the Democratic Socialist Republic of Sri Lanka, according to which the judicial power of the people is exercised by Parliament, through the courts, tribunals and institutions established by the Constitution or by law. Similarly, article 107 states that the Chief Justice, the President of the Court of Appeal and the judges of the Supreme Court shall be appointed by the President.

(d) Chad

135. The Chadian Government has given close attention to certain questions relating to the situation of lawyers (role played by lawyers in the protection of fundamental rights and freedoms, lawyers' possibilities of representing clients or taking on certain cases without fear of persecution), especially in articles 1, 2 and 16 of Decree No. 235.66/PR/MJ of 3 November 1966, establishing a bar association in the Republic of Chad.

136. However, as the Chadian Government itself states - with an honesty that does it great credit, some problems do remain, weakening the guarantees provided to lawyers in the exercise of their functions. On the one hand, lawyers are appointed by decree of the President of the Republic and can theoretically be removed by the same procedure; on the other hand, under article 9 of Ordinance No. 008/PR/MJ/91 of 3 August 1991, lawyers practise their profession under the supervision and control of the Procurator-General. This dependency, which is incompatible with an independent and impartial system of justice, should soon be eliminated by the new Lawyers' Regulations, which are currently being prepared.

3. Violations of fundamental freedoms

(a) Norway

137. Reference to the situation of the Norwegian Bar Association was made in the previous report (E/CN.4/Sub.2/1992/25, paras. 36-38). It should simply be recalled that the Norwegian Government and the Bar Association disagree on the right of the Association to call on its members to strike, especially over a dispute concerning the hourly fee paid to lawyers for legal aid services, which is fixed by the Government. The Ministry of Justice maintains its position and continues to reject the Bar Association's demand for the establishment of a system of negotiation, in particular on a statutory hourly rate for legal aid. It is thus difficult for an association which has the function of safeguarding member's interests, and especially their material interests, to accept the government decision refusing the right to strike, when the same branch of government with which it is dealing is also denying it the right to negotiate.

138. As mentioned in the previous report, the Association brought legal action against the governmental decision to deny it the right to strike. The decision, issued by the Oslo City Court on 1 July 1992, went against the Association. The City Court, which applied the rules of administrative law exclusively, found that there were no grounds to justify voiding the governmental decision. The Association has appealed, essentially on the grounds of freedom of association.

139. Regarding the disciplinary procedure applicable to lawyers, the commission mentioned in paragraph 37 of the previous report (E/CN.4/Sub.2/1992/25) submitted its recommendations to the Ministry of Justice in June 1992. Since legislation on the new disciplinary regime is pending, the Bar Association sees no reason to comment on the recommendations.

(b) Former Yugoslavia

140. In the previous report (E/CN.4/Sub.2/1992/25, paras. 142-143), the Special Rapporteur expressed concern at the dismissal by the Serbian parliament of some 200 judges of Albanian origin and the suspension of numerous judicial officials in the autonomous provinces of Kosovo and Metohija.

141. The reaction of the Government of the Federal Republic of Yugoslavia to these allegations has been less than convincing. It claims that it cannot be considered as having suspended any judicial official because the alleged acts took place as part of a reorganization of the judicial system aimed at securing equal protection of the rights and freedoms of citizens through the establishment of first and second-instance courts and a Supreme Court. In other words, it maintains that these dismissals were effected in conformity with the legal provisions in force, in particular the provisions of the Ordinary Courts Act of the Republic of Serbia (arts. 63 and 78) and the Public Prosecutors Act. These Acts authorize dismissal of a judge when it is established that, for example, he has committed a serious violation of his obligations, has discredited the judiciary through behaviour contrary to the protection of public order as determined by the Constitution and law, has failed to discharge his functions without valid reason, has violated a State secret or any other secret in the exercise of his functions, or has abused his authority. In the case under review, the Government justifies these dismissals on the grounds that the activities engaged in by the judges in question were directed at the separation of the autonomous provinces of Kosovo and Metohija. According to the Government's position, such activities undermine the constitutional order and the development of the entire territory of the Republic of Serbia. In these circumstances, the Government considers that these dismissals cannot be regarded as violating international standards or as being discriminatory within the meaning of the international conventions.

142. Without entering into a discussion on the motives underlying the dismissals, we are obliged to point out the serious fact that the Government has not adduced any convincing argument concerning the fact that the dismissed judges have been replaced by Serbian or Montenegrin judges. Finally, it should be noted that disciplinary measures, dismissals and suspensions must meet the requirements of proportionality, fairness, adversarial proceedings and legality set forth in articles 17-20 of the "Judiciary Principles" and articles 21 and 22 of the "Prosecutor Guidelines".

Part Two

REINFORCEMENT OF COOPERATION BETWEEN UNITED NATIONS PROGRAMMES TO GUARANTEE THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY AND ESTABLISHMENT OF A MONITORING MECHANISM

Chapter I

REINFORCEMENT OF COOPERATION BETWEEN THE UNITED NATIONS HUMAN RIGHTS PROGRAMME AND THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAMME

1. Unquestionably, a substantial number of issues relating to criminal justice have human rights implications. By way of example, reference may be made to the treatment of prisoners, alternatives to detention, torture and summary executions, capital punishment, the use of force and firearms by law-enforcement personnel, justice for juveniles, the protection of victims, domestic violence, the independence of the judiciary, the role of prosecutors and lawyers, etc.

2. The establishment of United Nations standards and conventions on crime prevention and criminal justice is related to efforts to combat crime more effectively, to make criminal justice more efficient and effective, and also more human, and, in all circumstances, to promote and encourage respect for human rights and fundamental freedoms. The standards formulated within the United Nations Crime Prevention and Criminal Justice Programme often serve as a benchmark for human rights bodies such as the Commission on Human Rights and the Sub-Commission, and treaty bodies such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture and the Committee on the Rights of the Child.

3. The instruments and procedures supervised by these bodies concern both the United Nations Crime Prevention and Criminal Justice Programme, and the United Nations human rights programme. Their proper implementation will be all the more effectively ensured as close collaboration is developed between the two programmes. A first step towards this goal was taken with the development of the advisory services programme, creating increasingly close links between (a) the crime prevention programme, and (b) training courses and seminars on human rights and the administration of justice (e.g. Romania, Albania). This cooperation must be strengthened and developed. It is rendered even more necessary by the fact that resources are limited and the complementary distribution of tasks will enable optimum use to be made of means and efforts.

4. In resolution 46/120 of 17 December 1991, the General Assembly paid a tribute to the work done in the area of the administration of justice and human rights in pursuance of the United Nations Crime Prevention and Criminal Justice Programme. The Commission on Human Rights, in its resolution 1992/31 of 28 February 1992, invited the new Commission on Crime Prevention and Criminal Justice to explore ways and means of cooperating with the human rights programme in the field of the administration of justice, with special emphasis on the effective implementation of norms and standards. The Economic and Social Council, in its resolution 1992/22, section IV, requested the

Commission on Crime Prevention and Criminal Justice to cooperate closely with the Commission on Human Rights, among other bodies. By the same resolution, the Council requested the Secretary-General to strengthen cooperation between the Centre for Human Rights and the Centre for Social Development and Humanitarian Affairs, including in particular preparations for the recent World Conference on Human Rights and coordination of the various technical advisory services provided by the two Centres, in order to undertake joint programmes and strengthen existing mechanisms for the protection of human rights in the administration of justice.

5. In order to facilitate active cooperation between (a) the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and (b) the Commission on Crime Prevention and Criminal Justice, the inter-sessional Working Group on the methods of work of the Sub-Commission proposed that the Chairmen of the Sub-Commission, the Committee on the Elimination of Racial Discrimination, the Human Rights Committee and the Commission on Crime Prevention and Criminal Justice should participate in the post-session work of the bureau of the Commission on Human Rights. They would thus have an opportunity to single out items on their agenda that might overlap, to identify questions of mutual interest and to make proposals with a view to strengthening cooperation between those bodies.

6. The Working Group on the methods of work of the Sub-Commission also put forward the idea that its Chairman should be able to transmit to the Sub-Commission, with a view to its submission to the Commission on Human Rights and the Commission on Crime Prevention and Criminal Justice, a memorandum, written in cooperation with the secretariats of those two bodies and after consultation between their respective Chairmen, containing a list of questions of mutual interest and a comparative analysis of the agendas of the two bodies and making proposals for the more efficient distribution of activities.

7. In this spirit, the World Conference on Human Rights (Vienna, 14-25 June 1993) emphasized this need in the Vienna Declaration and Programme of Action (A/CONF.157/23, part II, sect. A, para. 1):

> "The World Conference on Human Rights recommends increased coordination in support of human rights and fundamental freedoms within the United Nations system. To this end, the World Conference on Human Rights urges all United Nations organs, bodies and the specialized agencies whose activities deal with human rights to cooperate in order to strengthen, rationalize and streamline their activities, taking into account the need to avoid unnecessary duplication. The World Conference on Human Rights also recommends to the Secretary-General that high-level officials of relevant United Nations bodies and specialized agencies at their annual meeting, besides coordinating their activities, also assess the impact of their strategies and policies on the enjoyment of all human rights."

8. The Vienna Declaration and Programme of Action also contain the following paragraphs (part II, sect. C, paras. 69 and 70):

> "The World Conference on Human Rights strongly recommends that a comprehensive programme be established within the United Nations in order to help States in the task of building and strengthening adequate national structures which have a direct impact on the overall observance of human rights and the maintenance of the rule of law. Such a programme, to be coordinated by the Centre for Human Rights, should be able to provide, upon the request of the interested Government, technical and financial assistance to national projects in reforming penal and correctional establishments, education and training of lawyers, judges and security forces in human rights, and any other sphere of activity relevant to the good functioning of the rule of law. That programme should make available to States assistance for the implementation of plans of action for the promotion and protection of human rights.
>
> "The World Conference on Human Rights requests the Secretary-General of the United Nations to submit proposals to the United Nations General Assembly, containing alternatives for the establishment, structure, operational modalities and funding of the proposed programme."

Chapter II

ESTABLISHMENT OF A MONITORING MECHANISM

9. The Special Rapporteur, as he stated when introducing his progress report in 1992 (E/CN.4/Sub.2/1992/SR.20), said that almost all the norms established within his area of study had been formulated by the Commission on Crime Prevention and Criminal Justice. It is those norms which serve as a benchmark for gauging the independence and impartiality of the various judicial systems established. Consequently, within the context of the complementary distribution of activities between the Geneva and Vienna Commissions, it would appear logical that all matters relating to the formulation and teaching of norms should be entrusted to the Commission on Crime Prevention and Criminal Justice, while monitoring mechanisms should be the responsibility of the Commission on Human Rights, and hence also of the Sub-Commission.

10. The establishment of a monitoring mechanism for reviewing the question of the independence and impartiality of the judiciary would seem essential after examination of the still too numerous violations perpetrated today, only the most symptomatic of which have been described in the present report. The establishment of such a mechanism would also appear justified in the light of political developments in several regions of the world where clashes between social groups, religious groups, nationalities or States could lead to a deterioration in the situation of the partners of the judiciary, or even to suppression of the concepts of independence and impartiality of the judiciary. The need for such a mechanism is self-evident, as has been noted by numerous non-governmental organizations which have denounced the constant attacks and threats too often made against lawyers and judges. It is also in the interest of Governments themselves, provided that they affirm their will constantly to strengthen the rule of law. It is an obvious need, as stated by Mr. Singhvi in paragraph 389 of his report to the Sub-Commission in 1985 (E/CN.4/Sub.2/1985/18/Add.3): "The Special Rapporteur recommends that specific investigative studies on the violations of the independence of justice should be undertaken from time to time so that the basic human right of 'independent justice' guaranteed in article 10 of the Universal Declaration of Human Rights may be protected more effectively and consistently".

11. The question therefore arises whether or not to establish a mechanism capable of eliciting the cooperation of Governments, which would thus not be placed in the dock. This cooperation would be all the more fruitful if it was based on the possibility that Governments might take matters up of their own accord, which would enable them to address questions or situations that were still untouched or of immediate interest. This power would, in addition, resolve the problem of unintentional selectivity. The monitoring mechanism should also help to remedy the insufficient involvement of judges' and lawyers' professional organizations in a question which is nevertheless of

direct concern to them, by developing its contacts with these organizations, which are more accustomed to communicate with the Vienna bodies. The success of such an undertaking would require a mandate of some years' duration. Apart from this monitoring function, the special procedure instituted might comprise prospecting for new work areas whose importance and urgency, already considerable, will probably attain priority status: justice and the media, justice and reasons of state, justice and emergency situations, justice and anti-terrorism measures, etc.

Annex

DRAFT ADDITIONAL PROTOCOL TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS*

I. JURISDICTION AND THE JUDICIARY

1.1. Any dispute relating either to a norm's conformity with the Constitution or to a legally protected right or interest shall be referred to a court pre-established by the Constitution or the law and capable of hearing it in accordance with the requirements of a fair trial, with due respect for the primacy of the law, human rights and fundamental freedoms.

1.2. No court of special jurisdiction may be established.

1.3. In courts of every kind and at every level, the law shall be propounded by judges by means of orders, opinions, reports and decisions.

1.4. The general principles of the regulations on the judiciary shall be enunciated in the Constitution. They shall be implemented by the law, in accordance with the following provisions.

II. JUDGES

2.1. Judges shall be subject only to the law and justice. They shall exercise their functions in complete independence. They shall verify the constitutionality of the laws, directly or by referral to a constitutional court.

2.2. Judges shall be irremovable. They may be transferred, suspended, retired or dismissed or may undergo any other modification of their professional situation only in the cases and in accordance with the procedures regulated by law.

2.3. The procedure and criteria for recruitment of judges in accordance with the principle of equal access to public office, without discrimination as to race, sex or religious, philosophical or political belief, shall be determined by the legal regime.

2.4. The State has a duty to provide the judiciary with sufficient means for its efficient operation, in particular the means necessary for the initial and continuing training of judges.

III. THE HIGHER JUDICIAL COUNCIL

3.1. The Higher Judicial Council shall be responsible for the administration and discipline of the judiciary. It shall ensure the pluralism of the judiciary and shall guarantee the independence of judges.

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* Adopted by the Association of European Magistrates for Democracy and Freedoms (MEDEL) at its congress in Palermo on 16 January 1993.

It shall supervise recruitment, decide on the assignment of judges and organize professional training.

Of its own accord or at the request of the other authorities, the Higher Judicial Council shall address to parliament or the Government opinions and recommendations concerning judicial policy.

3.2. The Higher Judicial Council shall be composed, at least in respect of half its members, of judges elected by their peers in accordance with the rule of proportional representation. It shall also comprise prominent figures designated by parliament. Its members shall be appointed for a specific term.

3.3. The budget for the judicial system shall be voted by parliament, on the recommendations of Higher Judicial Council and the Government.

The Higher Judicial Council shall have a budget for the purpose of discharging its responsibilities.

3.4. The plenary meetings of the Higher Judicial Council shall be public, except for in-camera meetings as provided for in article 8.2, second paragraph.

The records, decisions, reports, views and recommendations, together with the budget and accounts, shall be given appropriate publicity. Decisions relating to the recruitment, assignment and discipline of judges shall be substantiated and subject to supervision of legality by a Supreme Court.

Every year, the Higher Judicial Council shall transmit to parliament a report on its activities and on the state of justice.

IV. JUDICIAL FUNCTIONS

4.1. Every court shall be organized in such a way as to be able to deal competently and expeditiously with the cases referred to it.

The distribution of cases between divisions and between judges shall be in conformity with the principle of the natural judge, on the basis of impersonal and predetermined systems of allocation.

The judges who make up a collegiate division shall preside over that division in turn.

4.2. The general meeting of judges of a particular court shall elect from among their number, for a specific term, those who shall be responsible for the functioning of the court. This competence may also be assigned to the Higher Judicial Council.

4.3. The Higher Judicial Council shall be responsible for the functioning and supervision of the courts.

It shall settle any disputes to which the organization of the service may give rise. Any person or institution concerned may refer such a dispute to it.

4.4. The judiciary regulations may provide for the Higher Judicial Council periodically to subject each judge to an objective personal evaluation intended to determine competence and to develop each judge's qualities, with a view to improving the service.

The evaluation procedure shall be adversarial.

V. THE JUDICIARY REGULATIONS

5.1. There shall be neither hierarchy nor gradation in the status of a judge, irrespective of the function exercised and the court in which it is exercised.

5.2. A judge's level of remuneration shall ensure his financial independence. Remuneration shall evolve in the light of the criterion of seniority of service.

5.3. The mobility of judges between courts of different kinds and between different levels of jurisdiction shall be organized by law.

The said mobility shall permit access to second-instance service upon appointment and shall, conversely, permit transfer from the appeal or cassation level to the preceding instances.

VI. THE DUTIES OF JUDGES

6.1. Judges shall resolve the cases with which they are seized impartially, diligently, in the light of the facts and in accordance with the law.

The law may authorize the expression of minority opinions in collegiate decisions.

6.2. An error in the administration of justice by judges shall not give rise to a direct criminal indemnity action. The injured party shall have the right to indemnity by the State. Action by the State against the judge in question shall be authorized by the Higher Judicial Council, after consultation with the interested parties.

VII. THE FREEDOMS OF JUDGES

7.1. Judges, like other citizens, shall enjoy the freedoms of expression, belief, association, membership of a political party and assembly. They shall have the right to strike. The exercise of this right shall not jeopardize the fundamental rights of the citizen.

7.2. Judges shall be free to form and join judges' associations and unions or other associations, in particular in order to safeguard fundamental rights, the service of justice and their own interests, to promote their professional training and to protect the independence of the judiciary.

The Higher Judicial Council shall, without discrimination, facilitate the activity of judges' associations. The senior officers of these associations may, at their request, be relieved of service for the duration of their term of office by decision of the Higher Judicial Council.

VIII. DISCIPLINE

8.1. The Higher Judicial Council shall deal with disciplinary complaints against judges without delay and equitably, in accordance with the procedure established by law.

8.2. The investigation and deliberations shall be adversarial in nature.

The deliberations shall be public, except in the case of in-camera deliberations for which due reason has been given, in particular when the private life of a judge or third party has to be protected.

The decision shall always be made public. It shall be substantiated and shall be given appropriate publicity.

8.3. An annulment appeal for violation of the law may be lodged against the decision before the Supreme Court.

IX. GOVERNMENT PROCURATORS

9.1. The autonomy of the public prosecutor's department constitutes a fundamental aspect of the independence of the judiciary.

Government procurators shall ensure the equality of citizens before the law. They shall exercise their functions independently of the political authority. They shall be subject only to the law and justice.

9.2. Judges who exercise the functions of the government procurators shall have the same freedoms as, and enjoy guarantees equivalent to, those defined by the present regulations.

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